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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 204.

ROBERT J. TRACY, PLAINTIFF IN ERROR,

v.

ALBERT A. GINZBERG, INDIVIDUALLY AND AS TRUSTEE IN BANKRUPTCY OF H. C. LONG & COMPANY.

BRIEF FOR THE DEFENDANT IN ERROR.

WILLIAM B. SULLIVAN,
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Attorneys for Defendant in Error.

ALFRED MUDGE & SON, INC. PRINTERS, 24 FRANKLIN STREET, BOSTON.

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STATEMENT OF THE CASE.

This is a suit in equity brought in the Supreme Judicial Court of the Commonwealth of Massachusetts by Robert J. Tracy, the plaintiff in error, against Albert A. Ginzberg, both individually and in his capacity as trustee in bankruptcy of H. C. Long & Co., for the purpose of recovering a certain fund now held by said Ginzberg as such trustee, and alleged to be rightfully due to said Tracy.

On Dec. 23, 1902, the partnership of H. C. Long & Co. consisting of one Long and one Sanderson, entered into the hotel business in Boston, Mass. They bought certain personal property to furnish and equip their hotel from James Everard's Breweries, and also took from said breweries an assignment of the lease of the hotel. Said breweries further expended the sum of $3000 to procure a liquor license to be surrendered up and cancelled, so that a new license might be issued for the premises to be occupied by H. C. Long & Co. It was necessary that an old license should be cancelled before a new one could be issued, because the number of licenses which can be in force in Boston at any one time is limited. (Rec., p. 17.)

That said breweries, moreover, paid the city of Boston the sum of $1400, which was the regular annual license fee; and that thereupon licenses to sell intoxicating liquors for the balance of the year ending April 30, 1903, was issued by the Board of Police, which was the duly constituted licensing authority, to Long, Sanderson and the plaintiff, Robert J. Tracy, as Herman C. Long & Co. (Rec., pp. 12, 13, 29, Ex. 9–10.) Tracy was the secretary of James Everard's Breweries.

At the same time (Dec. 23, 1902) Long and Sanderson executed a paper (Rec., p. 27, Ex. 3) purporting to assign and set over to Tracy their right, title and interest in said licenses, and agreeing that thereafter they would make application for licenses for said premises in their own and Tracy's names.

In April, 1903, H. C. Long & Co. desired to renew their licenses to sell intoxicating liquors, which would expire by limitation on April 30, 1903. Accordingly, James Everard's Breweries paid for them another fee of $1400 to the city of Boston, and on May 1, 1903, the Board of Police issued new licenses for the ensuing year to Long, Sanderson and Tracy as before. (Rec., pp. 13, 29, Ex. 9–10.) Long and Sanderson gave their note to James Everard's Breweries for this loan of $1400 (Rec., p. 28, Ex. 6) and later gave another chattel mortgage (Rec., p. 28, Ex. 5) to secure the same, and Long & Sanderson also executed another paper similar to the one given Dec. 23, 1903, purporting to assign to Tracy their right, title and interest in the licenses of May 1, 1903. (Rec., p. 28, Ex. 7.) Subsequently, on July 20, 1903, both of said chattel mortgages and the note for $7500 were assigned by James Everard's Breweries to the plaintiff in error, Robert J. Tracy. (Rec., pp. 27–29, Ex. 4–8).

Long and Sanderson were adjudicated bankrupts by the District Court of the United States for the District of Massachusetts on July 23, 1903, and the defendant in error, Albert A. Ginzberg, was duly appointed trustee of their estates. (Rec., p. 13.)

Ginzberg, as trustee in bankruptcy, nominated one O'Hearn

for the vacancy in the rank of licensees, caused by Long and Sanderson's retirement from business, and recommended said Board to issue a liquor license to said O'Hearn. (Rec., pp. 20, 21.) The Board of Police granted a license to O'Hearn, who thereupon paid Ginzberg, Trustee, $3000. (Rec., pp. 20, 21.) This suit is to recover that fund of $3000.

This case was tried before a single justice of the Supreme Judicial Court of Massachusetts sitting at Boston without a jury. In reference to the custom and practice of the Police Board of Boston concerning licenses held by liquor dealers who retire from business voluntarily, or who go into bankruptcy, the Court found the following facts from the evidence, to wit: That there is a custom of said Board of Police to give a preference to a person nominated by a retiring licensee, which custom is founded on the fact that the number of licenses which can be granted in the city of Boston is limited to one thousand; that where a licensee is adjudicated a bankrupt it is the custom of the Police Board to give the same preference to the trustee of the bankrupt's estate, and they require him to stipulate, so far as he can, that the proceeds received for the nomination are to be distributed pro rata among the creditors of the bankrupt liquor dealer; that the Board does not give any preference to a person to whom the license, or right to nominate a person to fill the vacancy caused by the former licensee retiring from business, has been issued to secure a debt, even if the debt was incurred by him to pay the licensee for the license in question; that Tracy's name was on the licenses merely as security for the debts due his principal; that he was not a partner in the business; that the Board of Police gave a preference to one O'Hearn, who was nominated to said Board for the vacancy by the trustee, and the license was issued to O'Hearn, who paid the trustee for such nomination $3000. And the Court found that said fund of $3000, which was the value of such nomination, was received by the defendant for something which he had and not for anything which the plaintiff had. (Rec., pp. 25, 26.)

The licenses issued to Long, Sanderson and Tracy dated May 1, 1903 (Rec., p. 29, Ex. 9, 10), were at all times, from the bankruptcy of Long & Co. to the trial, in possession of plaintiff. (Rec., p. 30.)

Upon the foregoing facts found by the Court, the bill was dismissed. Upon an appeal to the full court, the decree of the single justice was affirmed.

JURISDICTION.

DOES THE RECORD IN THIS CASE PRESENT ANY SUCH FEDERAL QUESTION AS TO CONFER JURISDICTION ON THIS COURT TO REVIEW THE JUDGMENT OF THE SUPREME JUDICIAL COURT OF MASSACHUSETTS?

The Federal question specially set up and claimed by the plaintiff at the trial appears in certain rulings of law which he requested the trial court to make, viz: —

FIRST. That the plaintiff's right in the license issued jointly to him and to Long & Sanderson, who subsequently assigned their interest to him, was a vested property right within the meaning of Article 14 of the Constitution of the United States.

SECOND. That the Police Commission of the city of Boston is not a judicial body, and its acts in dealing with the plaintiff's rights do not constitute due process of law within the meaning of Article 14 of the Constitution of the United States.

THIRD. That the plaintiff's contract with Long & Sanderson for assignment of licenses, and that they should make no application for a renewal of the licenses except to themselves and Tracy, was a vested, a property right, and is protected by the Constitution of the United States, Article 14.

FOURTH. That the defendant, Ginzberg, as trustee in bankruptcy, is bound by the assignments and covenants of Long & Sanderson with relation to this license as fully as the bankrupts were.

These rulings the Court declined to give. (Rec., p. 25.)

It is apparent from these requests as well as from the language of the bill that the plaintiff's position is that the assignments of their liquor licenses to him by Long & Sanderson (Rec., pp. 27, 28, Ex. 3–7) vested certain property rights in him; and that by reason of the action of the Police Board in granting new licenses to a third person without the knowledge or consent of the plaintiff in error he was thereby deprived of his property without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States.

The foundation of the plaintiff in error's case is the instruments whereby the bankrupts undertook to assign their right, title and interest in the liquor licenses to him. (Rec., pp. 27, 28, Ex. 3–7.) The plaintiff's bill is drawn upon the theory of his supposed rights in the licenses under these assignments.

It is, therefore, plain that the question whether these assignments of the licenses conferred any rights upon or transferred any property to the plaintiff in error is a most important and vital feature of the case. This question involves the administration of the laws governing the sale of intoxicating liquors in Massachusetts.

The Commonwealth of Massachusetts has prescribed in her statutes fully and in detail the manner in which and the conditions under which the privilege of engaging in this traffic may be granted; has delegated to certain officers the power to license the business; and has charged such officers with the duty of determining the personal fitness of an applicant for a license.

Revised Laws of Massachusetts, Chapter 100, Sections 10-17, and especially Section 16, provides that "the licensing board may at any time refuse to issue a license to a person whom it considers unfit to receive the same; but the provisions of this chapter shall not be so construed as to compel said licensing board to grant licenses." Undoubtedly the purpose of the legislation was to exclude from the ranks of liquor dealers all persons who do not seem to the licensing board fit or trustworthy, after a personal investigation.

The strict conditions imposed by statute and the manifest reasons for such supervision show that a license to engage in the liquor traffic (a business which is universally regarded as hazardous to the public morals and welfare) is a purely personal privilege granted or withheld by the State in the exercise of the police power.

The Supreme Judicial Court of Massachusetts has declared such a license to be a "personal trust."

Commonwealth *v.* Hadley, 11 Met. (Mass.) 66-71.

The reasons why such a personal privilege or personal trust should not be assignable are obvious. To permit a licensee to assign his license would defeat the main object of the liquor law, which is that the business shall be confined to those who proved themselves trustworthy to the Board. We believe that it has universally been held that such licenses are not assignable in the absence of specific statutory authority.

Strahn *v.* Hamilton, 38 Ind. 57.
Alger *v.* Weston, 14 Johns. (N. Y.) 231.
Gilday *v.* Warren, 69 Conn. 237.
In Re Blumenthal, 125 Pa. St. 412.

There is no statutory authority in Massachusetts permitting licenses to be assigned.

Any attempted assignments or agreements to assign licenses are absolutely void.

Am. and Eng. Encl. of Law, 2d edition, Vol. 17, page 232, 233.

Such is also the law in Massachusetts, as decided by the Supreme Court there.

In an opinion by Chief Justice Shaw, written in 1846, it was stated that "we do not mean to intimate that one can make a general assignment of his license because the law contemplates a personal trust."

Commonwealth *v.* Hadley, 11 Met. (Mass.) 71.

In the opinion of Chief Justice Knowlton in the case of Tracy *v.* Ginzberg, written in 1905, it was stated: "A license to sell intoxicating liquors, under the R. L., Chap. 100, is a personal privilege, which may be valuable as property, in a certain sense, for the personal use of the holder, but which is not assignable or transferable by him in any way."

Tracy *v.* Ginzberg, 189 Mass. 260.

The defendant in error respectfully claims that these decisions of the Supreme Judicial Court establish conclusively a question of local law or police regulation in Massachusetts. That a State has the exclusive power to regulate or prohibit the sale of intoxicating liquors within her borders in the exercise of the police power is so well established as to make the citation of authorities well-nigh superfluous.

Beer Co. *v.* Massachusetts, 97 U. S. 25.
Crowley *v.* Christensen, 137 U. S. 86.
Giozza *v.* Tiernan, 148 U. S. 657.
Gray *v.* Connecticut, 159 U. S. 74.

The point of law involved in this case — that an assignment of a license is invalid and confers no rights upon the assignee — is an important feature of the general power to control or regulate the business. Hence the question is peculiarly one of local law which each State should have the right to finally decide for itself. This court will not assume the right to review the judgments of the court of last resort of a State where the subject involved concerns purely a matter of local or general law.

Sayward *v.* Denny, 158 U. S. 180.
Henderson Bridge Co. *v.* Henderson City, 173 U. S. 592–608.
Telluride Power Transmission Co. *v.* Rio Grande Western Ry. Co., 175 U. S. 639–647.
Same *v.* Same, 187 U. S. 569–584.
Pennsylvania R. R. Co. *v.* Hughes, 191 U. S. 477–486.

As the plaintiff in error's case rests upon assignments which he alleges conveyed to him property or property rights, but which the Supreme Court of Massachusetts decides do not, because such assignments are void, we submit that the Supreme Court should not entertain jurisdiction of the case.

THIS COURT WILL NOT REVIEW FACTS ON A WRIT OF ERROR TO A STATE COURT.

The plaintiff in error bases his contention as to the law, and consequently as to his right to recover the money in dispute, upon the facts alleged in his bill. Even upon his theory of the law, viz., that the assignments of the licenses were valid and certain property rights vested in him, he is not entitled to relief unless the facts which he alleges, and which he must necessarily prove, are found to be true. One of the most important averments of fact in his bill is in paragraph 7, viz.: "that the defendant Ginzberg with the aid and assistance of the Police Board of the city of Boston, prior to the cancellation of said license, assumed to sell the aforesaid license to some party unknown to the plaintiff for the sum of three thousand dollars, which sum he refuses to pay over to the plaintiff." (Rec., p. 4.) And again, in paragraph 9, it is averred: "and without warrant of law (defendant) has disposed of a valuable privilege belonging to the plaintiff and has procured the destruction and cancellation of the plaintiff's valuable rights." (Rec., p. 4.) The meaning and substance of these allegations are that the defendant obtained the three thousand dollars in dispute by the sale of the licenses which the plaintiff claimed to own, or by defendant's interference with and destruction of some rights plaintiff had in said licenses. This was a necessary allegation for the plaintiff to prove in the suit, because he is attempting to impress a trust upon this fund in his favor.

In order to follow the fund he must show that it was realized from property which he owned or which he was rightfully entitled to. Therefore we contend that it was absolutely essen-

tial in the plaintiff's case upon his own view of the law that he prove the facts as alleged.

The trial court on this point found that these allegations of the plaintiff were not true, and upon appeal this finding of fact was sustained. (Rec., pp. 26, 42.) It is sufficient to say that the evidence abundantly justified the facts as found by the Court. In the opinion of the full court, written by the Chief Justice, the following language is used: —

"Upon the facts shown, the Board of Police Commissioners did not consider the insertion of the plaintiff's name in the original license as affecting their right to issue new licenses. It is plain they were right as regards the licenses for the ensuing year. Whether they were right or not in regard to the plaintiff's relation to the old licenses is immaterial, *for it is plain that the money received by the defendant was not paid on account of the plaintiff's interest, but on account of what the defendant did in enabling O'Hearn to obtain the new licenses.*" (Rec., p. 42.) The language of the trial justice is as follows: "It follows that the $3000 received by the defendant was received for something which he had *and not for anything which the plaintiff had*, and the defendant is entitled to have the bill dismissed with costs." (Rec., p. 26.)

It appears, therefore, that an insuperable obstacle confronts the plaintiff in error because of the facts as found by the court below. These findings are conclusive. This court will not, upon a writ of error, review findings of fact.

Telluride Power Transmission Co. *v.* Rio Grande Ry. Co., 175 U. S. 639–647.

Turner *v.* New York, 168 U. S. 90.

Crary *v.* Devlin, 154 U. S. 619.

In Telluride Power Transmission Co. *v.* Rio Grande Western Ry. Co., 175 U. S. 639, Mr. Justice Brown said, at page 645: —

"But in order to establish any rights under the statute it was incumbent upon the defendants to prove their priority of possession, or at least to disprove priority on the part of the

plaintiff. The question who had acquired this priority of possession was not a Federal question, but a pure question of fact, upon which the decision of the State Court was conclusive."

So we submit, before any question of law can properly be considered, it should first be found from the record that the fund which the plaintiff in error is pursuing was realized from the thing which he claimed to own as he alleges.

Whether under different facts the plaintiff might possibly have acquired rights under his assignments, or whether he would have been entitled to any relief if the defendant had realized money from the licenses which had been assigned to him, becomes immaterial in view of the actual situation, to wit, that the money was *not* realized from the sale of the licenses, but purely because the trustee in bankruptcy was able to induce O'Hearn to pay him this sum of money for his (the trustee's) influence in having a new license issued to O'Hearn. The plaintiff in error cannot contend that the trustee did anything wrong in requesting the police commissioners to issue a new license to O'Hearn. We apprehend that he would hardly contend that the trustee was under any obligation — assuming, of course, for the sake of argument at all times that the assignments had any validity — to assist him to realize upon the particular licenses which he claimed to own, and, in fact, had possession of. (Rec., p. 30.) The question presented upon the hypothesis of the facts alleged in the bill is whether, if the defendant had sold the licenses for a sum of money, the plaintiff would be entitled to that sum. As that question is based on a condition contrary to the facts, it is, of course, simply a moot question; and moot questions this court has repeatedly declined to consider.

M. K. & T. R'y Co. *v.* Ferris, 179 U. S. 602.

Hamblin *v.* Western Land Co., 147 U. S. 531.

St. Joseph & Grand Island R. R. Co. *v.* Steele, 167 U. S. 659–662.

Kimball *v.* Kimball, 174 U. S. 158–161.

Due Process of Law.

The plaintiff in error claims that he was deprived of his property without due process of law. If he means that the acts of the Board of Police in cancelling the licenses and granting new licenses to fill the vacancies did not constitute due process of law, it must be that he is estopped from such a contention by his very act of bringing this suit. He thereby ratifies what he regards as an unlawful sale and seeks to recover the proceeds of that sale. If he can get this money he will be content. That is all that he is attempting to do by his suit. In other words, the fund of three thousand dollars has taken the place of the property (according to his theory), and as his right to proceed against this fund is preserved, it becomes utterly immaterial whether the Board of Police acted regularly or irregularly in revoking the licenses.

Therefore, there is presented the case of a citizen of New York (Rec., p. 2) voluntarily coming to the courts of Massachusetts to try the title of a certain fund of money. He is given a full, fair and impartial trial; he exercises his right of appeal; and now because the final judgment of the highest court of the State, whose jurisdiction he himself sought, has decided against him, he asks this court for a review because there has been no "due process of law."

It seems to the defendant in error that this attitude of the plaintiff in error is thoroughly inconsistent with the definitions and applications of the term "without due process of law," as they have been laid down by this court.

Allen *v.* Georgia, 166 U. S 138–140.
Kennard *v.* Louisiana, 92 U. S. 480–483.
Foster *v.* Kansas, 112 U. S. 201.
Gallup *v.* Schmidt, 183 U. S. 300, 307.

A party who has invoked the jurisdiction of a State court to have determined the rights which he claims, should not be

allowed to complain that his constitutional guarantees were denied him because the litigation was unsuccessful for him.

Remington Paper Co. *v.* Watson, 173 U. S. 443.
Central Land Co. *v.* Laidley, 159 U. S. 103–112.
Head *v.* Amoskeag Manufacturing Co., 113 U. S. 9–26.

THE MERE ASSERTION OF A FEDERAL QUESTION IS NOT SUFFICIENT TO CONFER JURISDICTION ON THIS COURT.

This court has often announced that it would not take jurisdiction of a case, even though the alleged Federal question was duly and properly claimed, if it appears from the record that such a claim is fictitious or entirely devoid of merit.

Millingar *v.* Hartupee, 6 Wall, 258.
Wilson *v.* North Carolina, 169 U. S. 586–595.
Hamblin *v.* Western Land Co., 147 U. S. 531.

May it not be properly suggested by the defendant in error that so far at least as the second and third assignments of error (Rec., p. 39) are concerned the rule stated applies to them?

The second assignment alleges "that there was drawn in question a title right privilege or immunity claimed under a statute of the United States, to wit, the Bankruptcy Act approved July 1, 1898, and the decision was against the title right privilege or immunity of the plaintiff in error specially set up and claimed under said statute."

The Bankruptcy Act was not considered by the Court and its construction bore no possible relation to the case. The mere fact that the defendant in error is trustee in a bankruptcy case does not imply any construction of or any title right privilege or immunity under that statute.

It has been declared that "it must appear from the record by clear and necessary intendment that the Federal question

was directly involved so that the State Court could not have given judgment without deciding it."

Saywood *v.* Denny, 158 U. S. 180.
Equitable Life Assurance Society *v.* Brown, 187 U. S. 308, 311.
New Orleans Water Works Co. *v.* Louisiana, 185 U. S. 336–344.
St. Joseph & Grand Island R. R. Co. *v.* Steele, 167 U. S. 659.
Iowa *v.* Rood, 187 U. S. 87–92.

We confidently assert that the Bankruptcy Act was not involved, either directly or indirectly, so that the State Court must have passed upon it in rendering its decision.

The third assignment of error alleges that "there was drawn in question as enforced, the validity of a statute of Massachusetts, to wit, Chapter 100, Revised Laws of Massachusetts, especially Sections 17 to 20 inclusive, on the ground of its being repugnant as enforced to Article 1, Section 10, of the Constitution of the United States, and the decision was in favor of such validity of said Chapter 100, and more especially Sections 17 to 20." (Rec., p. 39.)

The defendant in error submits that this is one of those claims to which Mr. Justice Peckham referred in New Orleans Water Works Co. *v.* Louisiana, *supra*, where he said that "there must, in addition to the simple setting up of the claim be some color therefor, or in other words, the claim must not be of such a character that its mere mention does not show it destitute of merit."

This claim was not set up in the State Court; there is nothing in the record to indicate what topic of Section 10 of Article 1 of the United States Constitution is intended to be referred to; it is not apparent to the defendant in error how or in what respect the said statute of Massachusetts conflicts with or relates in any manner to this section of the Constitution.

Both the second and third assignments of error are believed to be fictitious claims, and therefore not entitled to any consideration by this court.

Is a Liquor License Property?

We apprehend that the plaintiff in error's position in regard to this subject will be that a liquor license is property, and hence is assignable, because alienation is an inherent incident of property.

The authorities do not seem to be altogether in agreement on the question of whether a liquor license is property. Some courts have held that it is.

> Fisher *v.* Cushman, 103 Fed. 860 (C. C. A. 1st Circ.).
> Matter of Lyman, 160 N. Y. 96.

The Supreme Judicial Court of Massachusetts in this case remarked that "A liquor license may be valuable as property, *in a certain sense*, for the personal use of the holder."

> Tracy *v.* Ginzberg, 189 Mass. 260.

On the other hand, in other jurisdictions it has been flatly held that a license was in no sense property.

> Lantz *v.* Hightstown, 46 N. J. Law, 102.
> Voight *v.* Board of Excise, 59 N. J. Law, 358.
> Board of Excise *v.* Barrie, 34 N. Y. 657.
> Sprayberry *v.* Atlanta, 87 Ga. 120.

Perhaps it is fair to state that there is no general concensus of opinion upon the subject, although probably the weight is in favor of considering a liquor license as property, but only in the narrowest and most restricted sense.

There is no analogy, as may be argued, between a liquor license and a stock exchange seat, or a market license, for

example. The latter are a species of property which can be transferred.

Sparhawk *v.* Yerkes, 142 U. S. 1.
Hyde *v.* Woods, 94 U. S. 523.
Nashua Savings Bank *v.* Abbott, 181 Mass. 531.
In Re Gallagher, 16 Blatch. 410.

The essential distinction between liquor licenses and most other kinds of licenses or stock exchange seats is that the element of public policy controls the one, while it has no relation to the other.

However, it would seem to be quite immaterial whether it be decided that a liquor license is property of a purely personal, non-transferable nature or is not property at all. In either view the plaintiff in error has no case as a matter of law.

The plaintiff in error upon his pleadings is forced to one of two positions in respect to his alleged "property rights." Either his claim must be as a transferee under the assignments to him from Long and Sanderson (Rec., pp. 27, 28, Ex. 3, 7), or that his rights were those of an original licensee. Only in one or the other of those capacities can he stand before the court as the owner of property or vested rights of which he has been unconstitutionally deprived.

So far as his character as a transferee or assignee is concerned, it has been sufficiently answered. The law seems to be established beyond doubt that an assignment of a liquor license is void and confers no rights upon the assignee.

Tracy *v.* Ginzberg, 189 Mass. 260.
Commonwealth *v.* Hadley, 11 Met. (Mass.) 66.
State *v.* Bayne, 100 Wis. 35.
Heath *v.* State, 105 Ind. 342.

If, on the other hand, he rests his case upon his supposed constitutional rights as a licensee, because his name was inserted in the licenses, the answer is that the holder of a license

acquires thereby no rights, privileges or immunities within the meaning of the Fourteenth Amendment; nor does the revocation of a license amount to a deprivation of property under that amendment.

A liquor license, of course, only purports to grant to the holder the privilege of conducting for a limited period of time what would otherwise be an unlawful business. The very most that Tracy could have claimed as of right was that he was permitted to engage in the liquor trade in the city of Boston.

That privilege is the only "right" which he can fairly and reasonably assert that he acquired as a *direct licensee.*

Now, it has been decided that the permission to sell intoxicating liquor is not a "right or a privilege" within the meaning of the Fourteenth Amendment of the Federal Constitution.

> Crowley *v.* Christensen, 137 U. S. 86.
> Giozza *v.* Tiernan, 148 U. S. 657.
> Bartemeyer *v.* Iowa, 18 Wall, 129.

A license is not a contract and confers no contractual rights upon the holder.

> Calder *v.* Kurby, 5 Gray (Mass.), 597.
> Le Croix *v.* County Commissioners, 50 Conn. 321.
> Board of Excise *v.* Barrie, 34 N. Y. 657.
> Sprayberry *v.* Atlanta, 87 Ga. 120.
> Stone *v.* Mississippi, 101 U. S. 814–820.

And it has accordingly been held that the revocation of a license does not constitute taking of property without due process of law.

> Board of Excise *v.* Barrie, 34 N. Y. 657.
> Sprayberry *v.* Atlanta, 87 Ga. 120.
> Schwuchow *v.* Chicago, 68 Ill. 444.

The authorities cited are sufficient to show that plaintiff in error is entirely mistaken when he avers in his bill as a matter

of law that the licenses or the attempted assignments to him from the bankrupts gave him any *vested rights* or *property* at all in the constitutional sense.

It may be added that it appeared to the Court that Tracy was not a partner in the business; that his name was put in the license merely in an attempt to secure a debt in violation of a well-known rule of the Board of Police (Rec., pp. 23, 40); and that he was a citizen of New York. (Rec., p. 2.) The authorities might well have found that he was not a *bona fide* licensee and that they had been imposed upon when they issued licenses to Long, Sanderson & Tracy as Herman C. Long & Co. (Rec., p. 29, Ex. 9.) If he was guilty of practising a fraud upon the licensing board, whereby he secured the insertion of his name as a nominal licensee, he ought not to have a right to invoke any constitutional protection in the premises.

THE FUND IS ASSETS OF THE BANKRUPT'S ESTATE.

The fund of $3000 is rightfully held by the trustee in bankruptcy as assets of the estate of H. C. Long & Co. It does not lie in the mouth of plaintiff in error to assert that this money is not properly assets of the estate nor to accuse the defendant in error of being an intermeddler if he fails to prove a better title to the money.

It has moreover been held in similar cases that money realized from the nomination for a license is assets of a bankrupt estate.

In re Fisher, 98 Fed. Rep. 89 (D. C. Mass.).
Fisher *v.* Cushman, 103 Fed. Rep. 860 (C. C. A.).
In re McArdle, 126 Fed. Rep. 440 (D. C. Mass.).

The United States Bankruptcy Act of 1898, in enumerating those things which pass to the trustee under Section 70-a 3, includes "powers which he might have exercised for his own benefit, but not those which he might have exercised for some other person."

Had Long & Co. not gone into bankruptcy, but had they voluntarily retired from business, surely the privilege of nominating their successor was "a power which they might have used for their own benefit." If through the courtesy of the Police Board their trustee is extended the same privilege, he is in duty bound to exercise that privilege as such trustee and to account to the Bankruptcy Court for any money he receives because of that privilege. Upon authority and reason he did his duty in availing himself of the situation to acquire a substantial sum for the creditors. His duty was to the creditors of the estate to act in the manner in which he did; he owed no duty to the plaintiff in error to refrain from acting. If the plaintiff in error was a *bona fide* licensee he might have gone to the Board of Police and nominated a candidate himself.

The record does not show that he made any attempt to do so.

If his complaint is simply that the Board of Police wrongfully cancelled his licenses, his complaint should be against them, not against defendant in error.

In conclusion, we most respectfully submit that both upon the ground of want of jurisdiction, and upon a consideration of the merits of the case, the judgment of the Supreme Judicial Court of Massachusetts should be affirmed.

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